

DEPARTMENT OF CALIFORNIA HIGHWAY PATROL

INITIAL STATEMENT OF REASONS

TITLE 13, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 6.5
AMEND ARTICLE 6, SECTION 1233

SAFETY COMPLIANCE RATINGS (CHP-R-11-03)

PURPOSE OF REGULATORY ACTION

Section 2402 California Vehicle Code (CVC) authorizes the Commissioner of the California Highway Patrol (CHP) to make and enforce regulations as necessary to carry out the duties of the CHP. Sections 34501 and 34501.5 CVC allow the CHP to adopt reasonable rules and regulations that, in the judgment of the CHP, are designed to promote the safe operation of vehicles described in Section 34500 CVC including, but not limited to, controlled substances and alcohol testing of drivers by motor carriers, hours of service of drivers, equipment, fuel containers, fuel operations, inspection, maintenance, record keeping, accident reports and drawbridges. The adopted regulations are contained in Title 13, California Code of Regulations (13 CCR).

Section 34501(a)(4) CVC authorizes the CHP to inspect any vehicles in maintenance facilities or terminals, as well as any records relating to the dispatch of vehicles or drivers, and the pay of drivers, to assure compliance with the code and regulations adopted pursuant to the section. Section 34520 requires motor carriers and drivers to comply with the controlled substances and alcohol use, transportation, and testing requirements of Parts 382 and 655 and Sections 392.5(a)(1) and 392.5(a)(3) of, Title 49 of the Code of Federal Regulations. Section 34520 CVC also requires a motor carrier to make available for inspection, upon request of an authorized employee of the CHP, copies of all results and other records pertaining to the controlled substances and alcohol testing requirements.

Existing law in Sections 34505.1, 34505.6, and 34505.7 CVC in part, requires the CHP to recommend to the Department of Motor Vehicles, Public Utilities Commission, Interstate Commerce Commission or the successor agency, the Federal Motor Carrier Safety Administration suspend, revoke, deny, or take other administrative actions on a motor carrier's permit or authority, as appropriate, when a motor carrier has failed to comply with statute or regulation relative to motor carrier safety. Specifically, the CHP will make a recommendation for such action when a motor carrier fails to maintain any vehicle in a safe operating condition or to comply with the Vehicle Code or with applicable regulations contained in 13 CCR, and, in the opinion of the Department, that failure presents an imminent danger to public safety or constitutes a consistent failure to comply.

This rulemaking adopts criteria which will clarify the opinion of the CHP with regard to the terms imminent danger and consistent failure, as used in Sections 34505.1, 34505.6, 34505.7, and 34623 CVC.

SECTION BY SECTION OVERVIEW

Title 13, Division 2, Chapter 6.5, Motor Carrier Safety Regulations.

Article 6, Carrier Requirements

Section 1233 - Safety Compliance Ratings.

Subsection (b)(2) is amended in order to accommodate statutory renumbering. Due to statutory change effective January 1, 1999, Section 34501(a)(3) CVC was renumbered to (a)(4). The change in Subsection (b)(2) numbering is non-substantive; however, the subsection is amended in order to reflect the prior statutory change and accurately reflect the authority of the Department to conduct specified inspections and enter specified locations in order to conduct those inspections.

Subsection (e) is added to clarify the opinion of the CHP, with regard to the term consistent failure, as it is used in Sections 34505.1, 34505.6, 34505.7, and 34623 CVC. The subsection specifies three consecutive unsatisfactory safety compliance ratings, assigned as the result of any inspection outlined in Subsection (b) of the Section, will result in a finding of consistent failure by the Department. The finding of consistent failure may be used by the Department as the basis to initiate civil, criminal, or administrative action against any motor carrier, permit, operating authority, or license.

Subsection (f) is added to clarify the opinion of the CHP with regard to the term imminent danger, as it is used in Sections 34505.1, 34505.6, 34505.7, and 34623 CVC. A finding of imminent danger by the Department may be used as the basis to initiate civil, criminal, or administrative action against any motor carrier, permit, operating authority, or license. Additionally, the Subsection specifies any condition discovered by the Department during the conduct of any inspection outlined in Subsection (b), as described in added Subsections (f)(1) through (f)(5)(C), will result in a finding of imminent danger.

Subsection (f)(1) is added to specify one of several conditions under which a finding of imminent danger will be made by the Department. When, during the conduct of any inspection outlined in Subsection (b), more than one-half (50%) of the vehicles included in the inspection sample are placed out of service for imminently hazardous mechanical conditions, as outlined in the Commercial Vehicle Safety Alliance North American Uniform Out of Service Criteria incorporated in Section 1239, a finding of imminent danger will result.

Subsection (f)(2) is added to specify a condition under which a finding of imminent danger will be made by the Department. When, during the conduct of any inspection outlined in Subsection (b), it is discovered the motor carrier permitted or allowed any driver to, or any driver exceeded

the maximum allowable drivers' hours of service limits or made false reports regarding duty status, and that discovery exceeds 10 percent of the total days audited, a finding of imminent danger will be made. For the purpose of the Subsection, a motor carrier is deemed to have permitted or required a driver to commit a violation notwithstanding articulable proof the motor carrier had prior knowledge of the violation. Additionally, any combination of drivers' hours of service limits violations and false duty status reports may be used in determining the 10 percent calculation.

The CHP audits drivers' records of duty status (RODS) for a sampling of drivers assigned to any terminal operated by a motor carrier in order to determine compliance with applicable requirements. The sampling size is dependant on the size of the carrier and the number of drivers assigned to the terminal, and determined by the Department. At least 30-days of RODS are audited for each driver selected and it is the responsibility of the Department to select drivers who the Department believes represent the greatest risk to public safety.

Calculation of "ten percent of the total days audited," as indicated above, will be made based on the actual number of drivers included in the inspection sampling and the number of RODS required, irrespective of the records having been presented. For example, every motor carrier shall require every driver used by them to record his or her duty status as required, retain the RODS for a minimum of six months, and make them available for inspection upon request. However, it is often discovered some or all of these requirements are violated. As a result, an inspection intended to include a full 30-day sampling of RODS for any one or more driver(s) may result in an actual inspection of far less records. The "ten percent of total days audited" calculation will be made based on the requirements for the documents and not the actual number of documents presented by the motor carrier for inspection.

Subsection (f)(3) is added to specify a condition under which a finding of imminent danger will be made by the Department. A finding of imminent danger will be made when, during the conduct of any inspection outlined in Subsection (b), it is discovered a motor carrier allowed, permitted, required, or authorized a driver to drive a commercial motor vehicle (CMV) when the driver's license status prohibits such operation. In this case, the licensing status prohibition must be the result of violations directly related to the operation of any vehicle.

For the purpose of the Subsection, a motor carrier is deemed to have permitted, required, or authorized a driver to drive a CMV if the motor carrier knew or should have known the driver's license status prohibited such driving. For example, when a motor carrier is required by any statute or regulation to be notified or knowledgeable of the driver's driving privilege status, the carrier failed to comply with those requirements, and the driver's privilege prohibits vehicle operation, the motor carrier should have known the status of the driver's driving privilege prohibited vehicle operation. When it is discovered a driver drove a CMV with a driver license of the inappropriate or incorrect class, a driver drove without a valid medical certificate, or a driver drove without a required special driver's certificate, those violations will not be included in determining a finding of imminent danger pursuant to the Subsection.

Subsection (f)(4) is added to specify a condition under which a finding of imminent danger will be made by the Department. When, during the conduct of any inspection outlined in Subsection (b), it is discovered lack of compliance with hazardous materials transportation or shipping requirements by a motor carrier or shipper jeopardizes public or environmental safety, or hinders prompt action by emergency response personnel, a finding of imminent danger will be made.

For the purpose of the Subsection, the phrase “jeopardizes public or environmental safety, or hinders prompt action by emergency response personnel” means, the motor carrier or shipper lack of compliance with hazardous materials shipping or transportation requirements presents an unreasonable risk to public or environmental safety, or unreasonably hinders emergency response personnel in the conduct of their duties associated with any hazardous materials incident mitigation, as determined by the Department.

Subsection (f)(5) is added to specify a condition under which a finding of imminent danger will be made by the Department. When, during the conduct of an inspection outlined in Subsection (b), it is discovered a motor carrier allowed a driver to perform a safety sensitive function in violation of Title 49, Code of Federal Regulations, as described in Subsections (f)(5)(A) through (f)(5)(C) of this section, a finding of imminent danger will result.

For the purpose of Subsection (f), the phrase “perform a safety sensitive function” means the driving of a commercial motor vehicle on a highway. Additionally, a motor carrier is deemed to have allowed a driver to perform a safety sensitive function in violation of Title 49, Code of Federal Regulations notwithstanding articulable proof the motor carrier had prior knowledge of the driver having been in violation of Title 49, Code of Federal Regulations.

Subsection (f)(5)(A) is added to specify a condition under which a finding of imminent danger will be made by the Department. When, during the conduct of an inspection outlined in Subsection (b), it is discovered a driver performed a safety sensitive function or a motor carrier permitted a driver to perform a safety sensitive function when the driver had a blood alcohol concentration of 0.04 percent or greater, the driver used alcohol while on duty, or the driver used alcohol within four hours prior to going on duty, a finding of imminent danger will be made.

A motor carrier is deemed to have permitted a driver to perform a safety sensitive function notwithstanding articulable proof the motor carrier had prior knowledge the driver engaged in any prohibited conduct described in the Subsection. For example, it is not necessary to determine that a motor carrier had prior knowledge that a driver used alcohol within four hours prior to going on duty, it will only be necessary to determine the driver engaged in the prohibited conduct and performed a safety sensitive function.

This Subsection does not apply to a driver performing a safety sensitive function or a motor carrier allowing a driver to perform a safety sensitive function if the driver is in compliance with the return to duty and follow-up requirements outlined in Title 49, Code of Federal Regulations, Part 40.

Subsection (f)(5)(B) is added to specify a condition under which a finding of imminent danger will be made by the Department. When, during the conduct of an inspection outlined in Subsection (b), it is discovered a driver performed a safety sensitive function or a motor carrier allowed or permitted a driver to perform a safety sensitive function when the driver has refused to submit to any controlled substances or alcohol test as required by Title 49, Code of Federal Regulations, a finding of imminent danger will be made. A motor carrier is deemed to have permitted or required a driver to perform a safety sensitive function when it is determined a driver refused to submit to any controlled substances or alcohol test, and the driver performed a safety sensitive function.

Motor carriers which choose to use a Consortium/Third-party administrator (C/TPA) to provide or coordinate the provisions of drug and alcohol testing services remain accountable for the actions of its drivers. For example, when a driver is chosen for a random controlled substances or alcohol test it is the responsibility of the motor carrier, not the C/TPA, to ensure the driver proceeds immediately to the collection site for the required test(s).

This Subsection does not apply to a driver performing a safety sensitive function or a motor carrier allowing a driver to perform a safety sensitive function if the driver is in compliance with the return to duty and follow-up requirements outlined in Title 49, Code of Federal Regulations, Part 40.

Subsection (f)(5)(C) is added to specify a condition under which a finding of imminent danger will be made by the Department. When, during the conduct of an inspection outlined in Subsection (b), it is discovered a driver performed a safety sensitive function or a motor carrier permitted a driver to perform a safety sensitive function when the driver has used a controlled substance, has a “verified” positive test, or has adulterated or substituted a test specimen, a finding of imminent danger will be made.

A motor carrier is deemed to have permitted a driver to perform a safety sensitive function notwithstanding articulable proof the motor carrier had prior knowledge the driver engaged in any prohibited conduct described in the Subsection. For example, it is not necessary to determine that a motor carrier had prior knowledge that a driver used a controlled substance, it will only be necessary to determine the driver engaged in the prohibited conduct and performed a safety sensitive function.

A motor carrier which uses a driver prior to the results of a pre-employment drug test are known or without making controlled substances and alcohol information request from previous employers, as required in Title 49, Code of Federal Regulations, will also result in a finding of imminent danger if any condition outlined in this subsection is determined. For example, a finding of imminent danger will be made for a motor carrier that permitted or allowed a driver to perform a safety sensitive function prior to the results of a pre-employment test being known and it is later determined the driver had a verified positive test; or a motor carrier uses a driver without making controlled substances and alcohol information request from previous employers, as required, and it is later determined the driver had a verified positive test.

This Subsection does not apply to a driver performing a safety sensitive function or a motor carrier allowing a driver to perform a safety sensitive function if the driver is in compliance with the return to duty and follow-up requirements outlined in Title 49, Code of Federal Regulations, Part 40.

Subsection (e) is renumbered to accommodate the proposed Subsection (g).

STUDIES/RELATED FACTS

None

CONSULTATION WITH OFFICIALS

None

LOCAL MANDATE

These regulations do not impose a new mandate on local agencies or school districts.

IMPACT ON BUSINESS

These regulations affect every motor carrier subject to inspection pursuant to Section 34501(a)(4) and 34520 CVC. All those on the interested party list are notified of proposed changes and given the opportunity for comment. It is assumed that both small and large businesses, as well as industry advocates are included in this group, although the Department does not request nor maintain such data. Nothing in these regulation changes impact businesses which operate in compliance with applicable laws and regulations.

ALTERNATIVES

The CHP has not identified any alternative, including the no-action alternative, which would be more effective and less burdensome for the purpose for which this action is proposed. Additionally, the CHP has not identified any alternative which would be as effective and less burdensome to affected persons other than the action being proposed.

ECONOMIC IMPACT TO THE STATE

The CHP has determined these regulation amendments will result in:

- No significant compliance cost for persons or businesses directly affected.
- No discernible impact on the level and distribution of costs and prices for large and small businesses.
- No impact on the level of employment in the state.